IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO.1260 OF 2005

IN

L.C.SUIT NO.1736 OF 2001

ALONG WITH

CIVIL APPLICATION NO.552 OF 2005

M/s.Ratnagiri Hotels Pvt.Ltd. & Ors....Appellants

Versus

The Municipal Corporation of Geater Bombay & Anr. ...Respondents

.....

Mr.P.C.Kansara for Appellants.

Mr.Xavier for Respondent No.1.

Mr.C.S.Bhandari i/b Johnson John for Respondent No.2.

.....

CORAM: A.M.KHANWILKAR, J.

FEBRUARY 1, 2006.

P.C.

1. Heard Counsel for the parties. Perused the relevant record. Admit. Counsel for the Respondents waive service. By consent, matter heard finally forthwith as short question is

involved.

2. This Appeal is against the order dated 24th January 2005 passed by the Trial Court dismissing the Suit preferred by the Appellants. Following order came to be passed :

> "Plaintiff and Advocate absent.
> Mr.Sonawane-Patil, Advocate for B.M.C.
> Writ of Summons is not served. The plaint itself is required to be rejected. Suit dismissed. No order as to costs. Record and proceeding to record proceedings."

3. The specific grievance of the Appellants before this Court is that the question of serving Defendant Corporation did not arise as the said Defendant was directed to waive service of the Suit and the Notice of Motion in terms of the order dated 31st March 2001. To support this position, reliance is placed on the Roznama dated 31st March 2001. The said order reads thus :

> "Mr.Kansara, advocate for the plaintiff.
> Mrs.Joshi, advocate for the B.M.C.
> Heard the parties. Parties to maintain status-quo and the order of the Deputy Municipal Commissioner dated 16/1/2001 not to be executed till further orders. Notice of Motion returnable on 20/4/2001. Liberty to corporation defendants are directed to waive service of suit and Notice of Motion.
>
> Plaintiff to supply old records of the

> earlier suit to the corporation. Plaintiff to immediately intimate this order to the ward officer."

4. On going through the order dated 31st March 2001 as produced, the correctness of which is not in dispute before this Court, it necessarily follows that under this order, Corporation Defendant was directed to waive service of Suit and the Notice of Motion. This direction is issued presumably because the Corporation was represented by Advocate before the Trial Court on 31st March 2001, as can be seen from the abovenoted Roznama. Once this conclusion is reached, the order which is impugned in this Appeal will have to be set-aside because it proceeds on the assumption that the Defendant Corporation was not served with the writ of summons. That is the only reason recorded in the impugned order dated 24th January 2005 for dismissing the suit, in view of the objection taken by the Counsel for the Corporation before the Trial Court. That objection was unavailable to the Corporation as is clear from the order dated 31st March 2001. Accordingly, this Appeal ought to succeed.

5. Counsel for the Corporation, however, has

opposed granting any relief to the Appellants on the argument that the conduct of the Appellants does not warrant any indulgence, much less, passing discretionary order in favour of the Appellants. In support of this argument, it was contended that the impugned order came to be passed by the Trial Court on 24th January 2005 and as there was no protection available to the suit structure, the same was demolished on 8th February 2005. It is further contended that the fact that the structure has been demolished, was not brought to the notice of this Court on 10th February 2005, when order of status-quo was passed, which position was placed on record by Mr.Mohan Manrupchand Shah (Jain) the constituted attorney of Mrs.Sohani Mohan Shah (Jain) on affidavit dated 3rd March 2005. It was also placed on record that taking advantage of the order of status-quo, the Appellants have restored the premises to its original position. This submission, however, overlooks that in view of the controversy raised, this Court passed order on 11th July 2005 appointing Court Commissioner to inspect the suit property. The Court Commissioner, in turn, has submitted report on 18th August 2005. In fact, the contents of the said report have been

analysed by this Court on 22nd September 2005. The only breach that was noticed was with regard to refixing the shutters by the Appellants which were demolished by the Corporation on the earlier occasion. This Court by the same order, directed the Appellants to remove the said shutters and to restore to position as it obtained after demolition. It has come on record that the Appellant has complied with the said direction.

6. During the course of arguments, the other discrepancy which is brought to my notice by the Counsel for the Corporation is that, the Commissioner has noted that the roof of the open space has been covered with plastic. That, in my view, does not mean that any alteration to the demolished structure has been effected. The open roof has been covered by the plastic with a view to protect the property and to cover the open space. It is not alteration of structure as such, after demolition.

7. Be that as it may, the Appellants have already removed the shutters and restored the position of the suit structure as it obtained after

the demolition on 8th February 2005. If it is so, the above conduct of the Appellants cannot be the basis to non-suit the Appellants.

8. Counsel appearing for Respondent No.2 the landlord, however, contends that no fault can be found with the impugned order dated 24th January 2005. This is so because the Respondent No.2 was not served with the writ of summons. Even the order dated 31st March 2001 will be of no avail to the Appellants to support the stand that Defendant No.2 was served. There is no substance in this submission. Firstly, this submission clearly overlooks the tenor of the order dated 24th January 2005 which is impugned in this appeal. That order has been passed on the singular ground that Defendant Corporation has not been served with the writ of summons, in terms of the objection raised. That ground is unavailable in view of the order dated 31st March 2001 as is observed earlier. As that being the only ground and will have to be effaced from the record, and in the interest of justice, the parties will have to be relegated to

the original position as obtained on 24th January 2005, by restoring the Plaint to the file of the Trial Court to its original number, to be proceeded in accordance with law.

9. Counsel for the Corporation, however, contends that nothing survives for consideration in the appeal, as the offending structure has now been demolished for which reason, the Appeal should be dismissed. This submission, to say the least, is ill-advised. Even if the structure is demolished that does not denude the Plaintiff of his right to challenge the action which was proposed at the relevant time, when the Suit was instituted. If the Plaintiff was to succeed in that challenge, all other reliefs as would be warranted, will have to be moulded by the Trial Court at the end of the trial. This obviously will be after the Plaintiff takes steps to amend the Plaint and ask for appropriate reliefs in that behalf. All those matters will be relevant before the Trial Court.

10. Taking any view of the matter, I see no basis to dismiss this Appeal. Instead, the

appropriate order that ought to be passed and I am inclined to pass in the fact situation of the present case is to set aside the impugned order dated 24th January 2005 and thereby restore the suit to the file of the Trial Court to its original

number to be tried and decided in accordance with law.

11. The Appeal succeeds on the above terms. No order as to costs.

12. All questions relating to the merits of the case including likely to arise on the basis of assertion of the Plaintiff after carrying out necessary amendment, will have to be considered on its own merits in accordance with law, uninfluenced by the observations in the present proceedings. The parties shall appear before the Trial Court on 7th March 2006 to enable the Trial Court to issue necessary directions in the restored suit.

13. If any request is made by the parties to the Trial Court for expediting the suit, that may be considered by the Trial Court as may be advised.

14. In view of the above order, accompanying Civil Application also stands disposed of.

A.M.KHANWILKAR, J.